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No. 94-1967

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

FILIBERTO E. MONTOYA AND
ROSARIO MONTOYA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal prosecutor violated the Fifth Amendment or 18 U.S.C. 6002 when he sought approval from the Attorney General to prosecute a witness who testified under a grant of use immunity because the witness had given false and misleading testimony.

2. Whether the federal prosecutor's decision to recommend prosecution because the witness had given false and incomplete testimony is evidence of vindictive prosecution in violation of the Due Process Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 429-466) is reported at 45 F.3d 1286.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1995. The petition for rehearing was denied on May 3, 1995. Pet. App. B. The petition for a writ of certiorari was filed on June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering guilty pleas in the United States District Court for the Southern District of California, petitioner Filiberto Montoya was convicted of conspiring to commit bank fraud and to engage in monetary transactions in property derived from drug trafficking, in violation of 18 U.S.C. 371, 1344, and 1957(a), and petitioner Rosario Montoya was convicted of making a false statement on a loan application, in violation of 18 U.S.C. 1014. Filiberto was sentenced to 41 months' imprisonment, to be followed by three years of supervised release. Rosario was sentenced to 24 months' imprisonment, the service of which was suspended in lieu of a three-year term of supervised probation. The court of appeals affirmed, with one judge dissenting. Pet. App. 429-466.

1. The present proceedings arose out of the government's investigation of the Contreras-Subias drug trafficking organization. The government learned that several real properties in San Diego County, California, were connected with the Contreras organization. Assistant United States Attorney (AUSA) Reese was assigned to investigate. During the course of that investigation, the government obtained documents indicating that petitioner Filiberto Montoya had acted as a real estate agent in transactions in which members of the Contreras organization or its nominees acquired real property. Pet. App. 435-436.

A separate investigation revealed that Montoya was involved in a real estate transaction in Oklahoma on behalf of the Contreras family. The investigation led to money laundering indictments of members of the Contreras organization in Oklahoma. AUSA Reese

was assigned to assist in that prosecution. Pet. App. 436.

Montoya's attorney contacted Reese, and they discussed the possibility of Montoya's cooperating in the investigation. Reese wrote a letter granting Montoya informal use immunity, and Montoya was subsequently interviewed several times. Montoya later testified under a formal grant of immunity before the grand jury in San Diego and at the Oklahoma trial. Pet. App. 436.

Pursuant to Department of Justice Guidelines that require express written authority of the Attorney General to prosecute an individual for an offense that is closely related to the individual's compelled testimony, see U.S. Attorneys' Manual § 9-23.400 (Oct. 1, 1990), Reese requested authorization from the Attorney General to prosecute petitioners on the instant charges. In the application, Reese stated that Montoya had given false and incomplete testimony both before the San Diego grand jury and at the Oklahoma trial. Reese described two incidents involving Montoya's testimony that led him to that conclusion. First, Montoya initially denied to the grand jury that he knew the leader of the Contreras organization. The application then explained why Reese believed that Montoya had deliberately withheld information about his acquaintance with the leader. Second, at the Oklahoma trial, Montoya denied knowledge of certain summaries of expenses of the properties. Previously, however, Montoya had given the government information which tended to show that the Contreras family rather than the nominal owners controlled the properties. Based on Reese's application, the Attorney General granted

authorization for the instant prosecution. Pet. App. 436-437, 451.

Because of Reese's exposure to Montoya's immunized statements and testimony, petitioners' prosecution was turned over to another AUSA, who later was replaced by AUSA Weiner. Pet. App. 436-437 & n.1. The transcripts of Montoya's grand jury and trial testimony were not made available to the Weiner team investigators, and the reports of his post-immunity interviews were sealed. *Id.* at 448 n.9. The instant indictment followed.

2. Petitioners filed a motion to dismiss the indictment on the ground that it was tainted by Montoya's immunized testimony. In its response to the motion, the government filed declarations from nine prosecutors and agents who participated in the Reese and Weiner investigations. The district court denied the motion to dismiss, finding that the government had shown that the evidence used to indict Montoya came from independent sources. Pet. App. 437-438. The district court granted reconsideration, but once again denied the motion to dismiss. *Id.* at 438-439. The court also denied petitioners' motion to dismiss based on vindictive prosecution. *Id.* at 439. Thereafter, petitioners entered conditional guilty pleas preserving their right to appeal the denial of their motion to dismiss. *Ibid.*

3. The court of appeals affirmed. Pet. App. 429-460. The court first rejected petitioners' claims that the government had made evidentiary use of Montoya's immunized testimony. Pet. App. 444-448. The court concluded that "[t]he nine detailed declarations filed by the Government establish that the indictment rested entirely on [independent] sources." *Id.* at 448.

The court next rejected petitioners' contention that Reese's consideration of the falsity and incompleteness of Montoya's immunized testimony in deciding to recommend prosecution constituted an impermissible non-evidentiary use of that testimony. The court assumed, without deciding, that "some non-evidentiary uses" might be prohibited by the federal immunity statute. Pet. App. 449. Nevertheless, the court concluded that "Reese's involvement in requesting permission to prosecute was too remote from the criminal proceeding against Montoya to constitute non-evidentiary use of the immunized testimony against him." *Id.* at 452-453.

In reaching that conclusion, the court noted that Reese was not preparing the indictment, but was seeking the Attorney General's approval for a prosecution. Pet. App. 450. It further noted that Reese's application did not contain a summary of Montoya's immunized testimony. Rather, it merely described the two incidents that led Reese to believe that Montoya had given false and incomplete testimony. *Id.* at 451. The purpose of transmitting that information, the court explained, was not to show that Montoya was guilty of an offense, but to show that unusual circumstances justified his prosecution. *Id.* at 452. The court concluded that a rule that prevented the Attorney General from considering such information would interfere with the Attorney General's exercise of her discretion, would not be in the best interest of immunized witnesses, and would conflict with the public interest. *Ibid.*

Finally, the court rejected petitioners' contention that their prosecution was unconstitutionally motivated by government vindictiveness. The court con-

cluded that petitioners had failed to prove an "improper motive" for the prosecution. Pet. App. 458.

Judge Bright dissented. Pet. App. 460, 466. In his view, AUSA Reese violated Montoya's Fifth Amendment privilege by using Montoya's immunized testimony in recommending Montoya's prosecution. Pet. App. 462. In addition, Judge Bright concluded that Reese's decision to recommend prosecution based on his conviction that Montoya's testimony was false created a presumption of prosecutorial vindictiveness. *Id.* at 465-466.

ARGUMENT

1. Petitioners contend (Pet. 9-15) that the government improperly used Filiberto Montoya's immunized testimony against him in violation of the federal immunity statute and the Fifth Amendment. That contention is without merit.[1]

a. The immunity statute, 18 U.S.C. 6002, provides in pertinent part that "no testimony or other information compelled under [an immunity] order * * * may be used against the witness in any criminal case." In *Kastigar* v. *United States*, 406 U.S. 441, 448-449 (1972), the Court held that the immunity statute's protection against the use of compelled statements is coextensive with the Fifth Amendment. The Court further held that the statute imposes the burden on the government to show that "the evidence it proposes to use is derived from a

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[1] Although Rosario Montoya lacks standing to assert her husband's Fifth Amendment privilege, *Rogers* v. *United States*, 340 U.S. 367, 371 (1951), the government has agreed to dismiss her indictment should her husband prevail on his immunity claim. Pet. App. 440 n.4.

legitimate source wholly independent of the compelled testimony." 406 U.S. at 460.

The court of appeals found that the government had met its burden of showing that the evidence it used to obtain an indictment against Montoya was derived from sources that were wholly independent of the immunized testimony, Pet. App. 448, and petitioners do not challenge that conclusion. Rather, they contend (Pet. 6) that AUSA Reese's consideration of the falsity and incompleteness of Montoya's testimony in recommending his indictment constituted an improper non-evidentiary use.

Consistent with the language in *Kastigar* cited above, some courts have held that *Kastigar* precludes only evidentiary uses of immunized statements. See *United States* v. *Serrano*, 870 F.2d 1, 16 (1st Cir. 1989); *United States* v. *Mariana*, 851 F.2d 595, 600-601 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989); *United States* v. *Byrd*, 765 F.2d 1524, 1528-1531 (11th Cir. 1985). Other courts have held that certain non-evidentiary uses are also prohibited. See *United States* v. *Semkiw*, 712 F.2d 891, 893-895 (3d Cir. 1983); *United States* v. *McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). The court of appeals in this case did not attempt to resolve that issue as a general matter. Rather, it assumed that some non-evidentiary uses fall within the prohibitions of the immunity statute. Pet. App. 449. It held, however, that the particular use at issue here falls outside the scope of the immunity statute. *Id.* at 449-453. That holding is correct.

As the court of appeals noted, AUSA Reese used the immunized testimony for the limited purpose of seeking the Attorney General's authorization to prosecute. Pet. App. 450. After the Attorney General

authorized a prosecution, the actual decision to seek an indictment was made by AUSA Weiner, who never read any of Montoya's immunized testimony. Gov't C.A. Br. 8; Pet. App. 456 & n.11. As the court of appeals concluded, "Reese's involvement in requesting permission to prosecute was too remote from the criminal proceeding against Montoya to constitute non-evidentiary use of the immunized testimony against him." Pet. App. 452-453.

Moreover, AUSA Reese did not consider Montoya's testimony as substantive evidence of his guilt, but as evidence that he had not been truthful in his testimony. Consistent with that limited purpose, Reese did not provide a summary of Montoya's testimony to the Attorney General. Rather, he provided two examples from the testimony that showed that Montoya had given false and incomplete testimony. Pet. App. 451. The immunity statute does not preclude the government from deciding to prosecute an immunized witness because it is convinced that the witness has given false and incomplete testimony.

This Court's decision in *United States* v. *Apfelbaum*, 445 U.S. 115 (1980), is instructive. There, the Court held that the Fifth Amendment does not preclude the government from using a witness's immunized testimony at a subsequent prosecution for perjury. The Court explained that the Fifth Amendment does not provide a shield for a witness to commit perjury. *Id.* at 130-132. When a person gives false and incomplete testimony, the government is not limited to filing perjury charges against him. Because such testimony is not protected by the Fifth Amendment, the government may also consider it in deciding to prosecute the witness for an offense related to the immunized testimony, as long as the government's

evidence against the witness is derived from sources that are independent of the immunized testimony. See 2 S. Beale & W. Bryson, *Grand Jury Law and Practice* § 9.19, at 64 (1994 Cum. Supp.) ("it is not a 'use' of immunized testimony for the government to decide to prosecute the witness because it is convinced that the witness has perjured himself in the course of testify-ing under the grant of immunity"); *United States* v. *Burke*, 856 F.2d 1492, 1494 (11th Cir. 1988) (rejecting claim that government improperly decided to pro-secute defendant based on belief she had perjured herself in giving immunized testimony).

A contrary rule would defeat the purposes of the immunity statute. A major advantage of Section 6002 is that it encourages more complete testimony than a transactional immunity statute. Under a transactional immunity statute, a witness could, with impunity, reveal just enough information to obtain blanket immunity and then profess to remember no more. Under Section 6002, by contrast, the government's retention of the power to prosecute based on independent evidence creates a strong disincentive for the witness to withhold information. Thus, the United States Attorneys' Manual expressly provides that "less than complete testimony should not appear to be rewarded by a declination of prosecution in a case where independent evidence clearly exists and the situation otherwise warrants prosecution." U.S. Attorneys' Manual § 9-23.400 (Oct. 1, 1990). By precluding the government from considering, in deciding whether to prosecute, that a witness has given false and incomplete testimony, petitioner's approach would deprive the government of the ability to en-

courage full disclosure by immunized witnesses—a major goal of Section 6002.

b. Petitioners contend that the decision below conflicts with *United States* v. *Olivero*, 39 M.J. 246 (C.M.A. 1994), and *United States* v. *McDaniel*, *supra*. There is, however, no conflict. In *Olivero*, the United States Court of Military Appeals held that the decision to prosecute may not be based on immunized testimony. 39 M.J. at 249. And in *McDaniel*, the Eighth Circuit stated that the prohibited non-evidentiary uses of immunized testimony "could conceivably" include "assistance in * * * deciding to initiate prosecution." 482 F.2d at 311. But in those cases, the government could not show that the person who made the decision to prosecute was unaffected by the immunized testimony. *Olivero*, 39 M.J. at 249-250; *McDaniel*, 482 F.2d at 311. Moreover, in those cases, no contention was made that the immunized testimony was considered for the limited purpose of deciding whether the witness had given false and incomplete testimony. *Ibid.* Accordingly, neither case addressed the situation presented here, *i.e.*, where the person who made the decision to prosecute did not consider the immunized testimony, and those who did consider the immunized testimony did so for the limited purpose of deciding whether the witness had given false and incomplete testimony. There is therefore no conflict between those decisions and the decision below.[2]

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[2] Petitioners' reliance (Pet. 10) on *United States* v. *Byrd*, *supra*, is misplaced. There, the Eleventh Circuit held that *Kastigar* does not require a court "to inquire into a prosecutor's motives in seeking indictment." 765 F.2d at 1530. "So long as all the evidence presented to the grand jury is derived from

2. Petitioners' contention (Pet. 16) that the government engaged in vindictive prosecution is also without merit. Under the doctrine of vindictive prosecution, it violates due process for a prosecutor to use the charging process to penalize the exercise of constitutional or statutory rights. See, *e.g.*, *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *North Carolina* v. *Pearce*, 395 U.S. 711, 723-724 (1969). The short answer to petitioners' claim of vindictive prosecution is that Filiberto Montoya had no constitutional or statutory right to give false and incomplete testimony under the grant of immunity. *E.g.*, *Apfelbaum*, 445 U.S. at 127. Accordingly, to the extent the decision to prosecute petitioners rested on Montoya's lack of candor in giving his immunized testimony, that consideration did not have the effect of penalizing the exercise of any of his legally protected rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1995

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legitimate sources independent of the defendant's immunized testimony, and the grand jury finds that independent evidence sufficient to warrant the return of an indictment, the defendant's privilege against self-incrimination has not been violated." *Ibid.* *Byrd* therefore provides no assistance to petitioners here.